Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

THE BOEING COMPANY,

Petitioner,

v.

KENNETH W. ALDRICH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When an injured worker has applied for and is receiving monthly employer-provided disability benefits eventually totaling $20,000 and available only to permanently and totally disabled workers unable to engage in any gainful employment, and when he has also applied for and is receiving weekly workers compensation payments, eventually totaling nearly $27,000 and awarded for "temporary total disability," is he judicially estopped from contending in a lawsuit, brought against his employer pursuant to the Americans with Disabilities Act, that he could have performed the essential functions of his job with reasonable accommodation, and was therefore a "qualified individual with a disability," within the meaning of the Americans with Disabilities Act?

2. When an injured worker has settled his future workers compensation claim for "permanent partial general disability" in exchange for a lump sum $30,000 payment from his employer, and when he has obtained that settlement only as a result of his explicit, sworn testimony that he could not perform the essential functions of his job with or without accommodation, is he judicially estopped from contending in a lawsuit, brought against his employer pursuant to the Americans with Disabilities Act, that notwithstanding his sworn testimony to the contrary he could indeed have performed the essential functions of his job with reasonable accommodation, and is therefore a "qualified individual with a disability" within the meaning of the Americans with Disabilities Act?

PARTIES AND PARENT OR SUBSIDIARY COMPANIES

All parties to the case are shown in the caption. Petitioner, the Boeing Company, has neither parent companies nor nonwholly owned subsidiaries that would require listing under Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

The Boeing Company respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The court of appeals opinion (App. 1 to App. 18) is reported as *Aldrich v. Boeing Co.*, 146 F.3d 1265 (10th Cir. 1998). The court of appeals order denying rehearing (App. 19) and the district court opinion (App. 20 to App. 38) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1998. Boeing timely filed its petition for rehearing in the court of appeals on July 15, 1998, and the court of appeals entered an order denying Boeing's petition for rehearing on July 28, 1998. Boeing filed an application (No. A-301) for an extension of time to file its petition for a writ of certiorari on October 14, 1998; Justice Breyer granted the application on October 15, 1998, and extended Boeing's time to file its petition for a writ of certiorari to and including November 23, 1998. Boeing invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 101(8) of the Americans with Disabilities Act, 42 U.S.C. § 12111(8), provides:

> **Qualified individual with a disability.** The term "qualified individual with a disability" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . .

Section 102(a) of the Americans with Disabilities Act, 42 U.S.C. § 12112(a), provides:

> **General Rule.** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

Statement of Facts

Respondent Kenneth Aldrich was a sheet metal worker in petitioner Boeing Company's Wichita, Kansas, aircraft production facilities from 1988 until August 1992, when work-related pain and numbness in his right forearm led him to complain to Boeing's medical department and then to consult an outside doctor. Respondent's doctor diagnosed him as suffering a job-caused "cumulative trauma syndrome manifesting as flexor tendon

tenosyvitis," and took him off work; Boeing, in turn, placed respondent on medical leave of absence.[1]

Boeing continued respondent on medical leave of absence until June 8, 1993,[2] when he and 223 other sheet

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[1] Boeing initially put respondent on medical leave of absence because his doctor had declared him medically unable to work, due to his injured forearm, and had stated that the date he might return to work was "unknown at this time." In mid-November 1992, noting an apparent improvement in respondent's condition, the doctor certified respondent for return to work, but imposed restrictions, such as limitations on his use of power tools; Boeing kept respondent on medical leave because the restrictions were incompatible with respondent's sheet metal job. In December 1992, the doctor again directed respondent to refrain from all work, in hopes that a period of minimal hand and wrist activity would "calm down" his tenosyvitis. In April 1993 the doctor gave respondent a permanent, partial disability rating, and again released him to return to work, but only in a job involving no riveting, bucking, power equipment use, or other repetitive activities involving his hands and wrists; at about the same time Boeing scheduled respondent for a seniority-based layoff from his sheet metal job after expiration of a 60-day WARN period. In May 1993 Boeing's Accommodation Review Board met to consider respondent's situation; the Board found that respondent's permanent medical restrictions could not be accommodated within his sheet metal job, and that no alternative positions at Boeing were available to him. Respondent was thereafter laid off, as scheduled, after the expiration of his WARN period.

[2] Boeing took respondent off medical leave of absence and assigned him for one week in December 1992 to a "WARN pool" of disabled workers scheduled for imminent layoff, who until their layoff dates were assigned to a wide variety of extremely light tasks consistent with their disabilities. Boeing returned respondent to his medical leave of absence after it discovered that he was not then scheduled for layoff and had been assigned to the WARN pool by mistake.

metal workers in his job code were laid off as part of a reduction in force; under the applicable collective bargaining agreement between Boeing and the Machinists' Union, respondent and the other workers in his job code were selected for layoff or retention based on their seniority. Respondent was one of more than 7,000 Wichita employees who lost Boeing jobs in a continuing series of layoffs which, between 1990 and 1994, reduced employment in Boeing's Wichita facilities by more than one third; the great bulk of these seniority-based layoffs occurred in 1992 and 1993.

Shortly after Boeing first placed respondent on medical leave of absence, he filed a workers compensation claim against Boeing and began receiving weekly $289 "temporary total disability" payments from Boeing pursuant to the Kansas Workers Compensation Act. By January 1995 respondent had received from Boeing workers compensation benefits of $26,753 in temporary total disability payments, $2,204 in medical payments, and $6,866 for vocational rehabilitation. Respondent also applied in February 1993 for permanent and total disability benefits through the "Boeing Disability and Life Insurance Plan," which by its terms provided disability benefits for workers who were "permanently and totally disabled" by an impairment which had "existed continuously for six months and will presumably prevent you from engaging in any employment for pay or profit for the rest of your life, including employment for which you may become fitted by education, training or experience." Respondent received these disability benefits of $325 per month until he reached the plan's disability benefits ceiling of $20,000 in 1998.

In March 1995 respondent and Boeing settled for $30,000 his pending workers compensation claim for "permanent partial general disability." That settlement reflected the approximate present value of respondent's claim for future weekly workers compensation benefits, based on a rating of 20% impairment, on respondent's previous wages as a sheet metal worker for Boeing, and on the assumption that he would not be able to work during the period when Boeing would be liable to make weekly workers compensation payments. In both his lawsuit and the workers compensation proceedings respondent was represented by legal counsel.

Boeing agreed to the $30,000 workers compensation settlement with respondent in express reliance on his assertions that he could not perform the essential functions of the Boeing job from which he had been laid off, even with reasonable accommodation. At the mandatory workers' compensation settlement hearing in which respondent's final, $30,000 lump sum benefits were approved, he testified as follows in response to questions by Boeing's counsel:

> Q: Okay. These restrictions [the permanent restrictions imposed by respondent's physician] prevent you from performing the essential job functions of the sheet metal mechanic position with or without accommodation?
>
> A: Assembler B,[3] yes.

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[3] Respondent's Boeing job had been in Job Code 305-04, "Assembler Installer Structures B," often referred to as a "sheet metal assembler" or "sheet metal mechanic" position.

. . . .

Q: Finally, I just wanted to make sure you understand and you agree that the settlement today for $30,000.00 to be paid in a lump sum is based on the fact and the understanding that your work restrictions are permanent, meaning that they won't be changed or lifted, and that these restrictions prevent you from performing the essential functions of the job as a sheet metal mechanic with or without accommodation?

A: Yes.

In the present Americans with Disabilities Act lawsuit, however, respondent makes exactly the opposite contention: he contends that he could have performed the essential functions of his job, had Boeing reasonably accommodated him, and that Boeing unlawfully discriminated against him because of his disability by denying him accommodation.

Course of Proceedings in the Courts Below

Respondent filed the present lawsuit against Boeing in the District Court of Sedgwick County, Kansas; in his lawsuit he claimed that Boeing had violated the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, by failing to reasonably accommodate his disability and then laying him off.[4] Pursuant to 28 U.S.C. §§ 1441 and 1446, Boeing removed the case to the United States

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[4] Respondent also raised ADA and state law retaliatory discharge claims, but he has abandoned them. *See* App. 2, n.1.

District Court for the District of Kansas, which had federal question jurisdiction over respondent's ADA claim under 28 U.S.C. § 1331.

Boeing moved for summary judgment on respondent's ADA claims; it argued that respondent had not made a sufficient rebuttal of Boeing's showing that his layoff was based purely on seniority and that his requested accommodations were neither required nor available. Boeing also argued, in the alternative, that respondent was judicially estopped from contending that he was a "qualified individual with a disability" entitled to ADA protection under 42 U.S.C. § 12112(a).

Boeing's judicial estoppel argument had two bases: (1) respondent had testified under oath in his workers compensation hearing that he could not perform the essential functions of his job, with or without reasonable accommodation, and had thereby admitted that he was not a "qualified individual with a disability" as defined in 42 U.S.C. § 12111(8); and (2) respondent had applied for and received Boeing disability plan benefits payable to employees who were permanently and totally disabled and would never again, for the rest of their lives, be able to obtain gainful employment of any kind.

The district court granted Boeing's summary judgment motion. *See* App. 20 to App. 38 (district court opinion). The district court accepted Boeing's arguments that respondent had not established the existence of a material factual dispute as to whether Boeing had laid him off because of his injury, rather than his seniority, or as to whether reasonable accommodations were required, in light of the apparently temporary nature of respondent's

injury, or were even available. *See* App. 31 to App. 35. The district court also accepted Boeing's independent, alternative argument that respondent was judicially estopped from claiming that he was a "qualified individual with a disability." *See* App. 35 to App. 37.[5]

On respondent's appeal, the court of appeals reversed the district court's grant of summary judgment in Boeing's favor. It discerned from its examination of the record that respondent had established genuine factual issues as to when Boeing learned that his alleged disability was permanent, rather than temporary, and thereby acquired a duty of reasonable accommodation, *see* App. 9 to App. 12, and as to whether reasonable accommodation was then possible, *see* App. 13 to App. 16.[6] More

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[5] The district court's judicial estoppel holding seems to be grounded primarily in respondent's successful application for disability insurance benefits. *See* App. 35 to App. 37. The district court's discussion of Boeing's other judicial estoppel argument, based on respondent's testimony during his workers compensation hearing, is limited to the statement that "any doubts" that respondent might have been "qualified" under the ADA "have been resolved by [respondent's] testimony at his worker's compensation hearing . . . that, with or without accommodation, he could not perform the . . . duties [of his sheet metal job]." *See* App. 32.

[6] Specifically, the court of appeals identified a genuine factual issue, based on the expert report of respondent's ergonomist, as to whether respondent might have been reasonably accommodated in his sheet metal job through modifications to his work environment and/or ergonomic training, and as to whether two alternative jobs (out of 25 alternative jobs suggested by respondent) might in fact have been available and might have provided an alternative reasonable accommodation. *See* App. 13 to App. 15 & nn.5-7.

important, the court of appeals rejected the district court's alternative rationale that respondent was judicially estopped from establishing his ADA claim's *sine qua non* that he was a "qualified individual with a disability." *See* App. 4 to App. 7.

In its judicial estoppel ruling, the court of appeals first held that respondent was not judicially estopped from pursuing his ADA claim "merely because he applied for and received benefits under Boeing's private disability plan and the Kansas workers' compensation statute." *See* App. 6. It based this holding on its recent decision in *Rascon v. U.S. West Communications, Inc.*, 143 F.3d 1324 (10th Cir. 1998), in which it had reaffirmed its consistent past "refusal to adopt the doctrine of judicial estoppel," *id.* at 1332 (citing *Parkinson v. California Co.*, 233 F.2d 432, 432 (10th Cir. 1956); *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir. 1986); and *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1520 n.10 (10th Cir. 1991)), and held that application for social security disability benefits "cannot be an automatic bar to a disability discrimination claim under the ADA," 143 F.2d at 1332. *See* App. 5 to App. 6.

The court of appeals also rejected Boeing's argument that respondent's sworn testimony in his workers compensation hearing that he *could not* "perform[ ] the essential functions of [his sheet metal job] with or without accommodation" judicially estopped him from making in this lawsuit the diametrically opposite contention that he *could* have performed those essential functions if only Boeing had granted him "reasonable accommodation." The court of appeals' ruling that respondent was not judicially estopped from flatly contradicting his own

prior sworn testimony was based on prior Tenth Circuit case law broadly rejecting *any* application of judicial estoppel in *any* case; that blanket rejection has been premised on the idea that application of judicial estoppel would "discourage the determination of cases on the basis of the true facts as they might be established ultimately." *See* App. 6 (quoting *Parkinson, supra,* 233 F.2d at 438; and *United States v. 49.01 Acres, supra,* 802 F.2d at 390). Consistent with that blanket rejection of judicial estoppel, the court of appeals explained that respondent's inconsistent past assertions might be admissible evidence under Fed. R. Evid. 801(d)(2), but could not be treated as "dispositive." *See* App. 6 to App. 7.

REASONS FOR GRANTING THE PETITION

This case presents important, frequently recurring questions as to the circumstances under which a person who has applied for and received disability benefits under a private insurance plan and under state workers compensation laws may be judicially estopped from asserting that he is a "qualified individual with a disability" for purposes of the Americans with Disabilities Act. There are four more-or-less distinct approaches used by the circuit courts of appeals who have addressed these and similar issues, but under the approaches used by most of the courts of appeals, respondent would be judicially estopped from contending that he was a "qualified individual with a disability." Only under the Tenth Circuit Court of Appeals' extreme and longstanding blanket rejection of any form of judicial estoppel could the rejection of Boeing's judicial estoppel defenses be justified:

under the other three approaches utilized in other circuits, the district court's grant of summary judgment in Boeing's favor would have been affirmed.

The importance of the judicial estoppel questions presented in this case is underscored by this Court's recent agreement to review the decision in *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513 (5th Cir. 1997), *cert. granted*, 119 S.Ct. 39 (1998), to consider closely similar judicial estoppel issues raised in that case. This Court's decision in *Cleveland* may well control the present case, and require that this case be remanded to the Tenth Circuit for further consideration.

Moreover, this case presents an additional judicial estoppel question not presented in *Cleveland*, and extreme facts that could hardly present a more convincing example of a claimant attempting to whipsaw his employer by presenting one set of facts when seeking disability benefits and workers compensation benefits and then, once that money was safely in hand, by presenting a diametrically opposite set of facts to support his ADA claim. The clear and important questions presented, the plain divisions in approach among the circuit courts of appeals, the false or shaky premises underlying the court of appeals' decision, and the blatant inconsistencies in respondent's assertions about his ability to do his job, make this case a prime candidate for this Court's discretionary certiorari review.

The Judicial Estoppel Holding of the Court of Appeals is Erroneous and Conflicts with the Decisions of Other Appellate Courts

Judicial estoppel, also known as the preclusion of inconsistent positions, *see, e.g.*, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4477 (1981), is a judge-made doctrine that prevents a party to a legal proceeding from taking a position inconsistent with a position the party has previously taken in another proceeding. *See. e.g., Simon v. Safelite Glass Corp.*, 128 F.3d 68, 71 (2d Cir. 1997). Since the 1990 enactment of the Americans with Disabilities Act, judicial estoppel issues have arisen in a large and growing number of ADA lawsuits in which the defendant employer has argued that the employee's positions in the lawsuit were inconsistent with positions the employee took when seeking disability benefits from social security, workers compensation, employer-funded ERISA plans, and the like. *See, e.g.*, K. Houghton, Commentary, *Having Total Disability and Claiming it, Too: The EEOC's Position Against the Use of Judicial Estoppel in Americans with Disabilities Act Cases May Hurt More than it Helps*, 49 Ala. L. Rev. 645, 646 (1998).

The federal courts of appeals have applied a variety of legal standards to the judicial estoppel questions in these ADA cases. *See, e.g.*, M. Sims, Comment, *Estop It! Judicial Estoppel and its Use in Americans with Disabilities Act Litigation*, 34 Hous. L. Rev. 843, 846-47 & n.24, 851-52 & n.47, 860-61 & n.108 (1997) (collecting ADA judicial estoppel cases decided under various standards); *Rascon v. U.S. West Communications, Inc.* 143 F.3d 1324, 1330-32 (10th Cir. 1998) (discussing the "varying views of other

circuits" in ADA judicial estoppel cases). The confusion engendered by these varying approaches has sometimes left courts and litigants without clear standards to follow, and that uncertainty has doubtless contributed to the burgeoning number of ADA cases in which judicial estoppel issues have been litigated.

As noted in *Rascon* (the decision on which the court of appeals based its judicial estoppel analysis in the present case), "the circuits do not align themselves on either side of a neatly drawn line; rather, their varying approaches to the issue lie along a continuum." 143 F.3d at 1330. One end of that continuum is anchored by *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 616-21 (3d Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997), which adopted a per se rule that a litigant who asserts that he is totally disabled in order to obtain disability benefits is estopped from asserting in an ADA lawsuit that he could have performed the essential functions of his job with reasonable accommodation.[7] Next on the continuum, and less likely to lead to preclusion, is the approach taken in *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513, 518 (5th Cir. 1997), *cert. granted*, 119 S.Ct. 39 (1998). Under the *Cleveland* approach, an ADA plaintiff's application for or receipt of disability benefits creates a rebuttable presumption, which can be overcome only by "credible, admissible evidence" to the contrary, that the applicant or

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[7] A different Third Circuit decision has since retreated from the *McNemar* per se rule. *See Krouse v. American Sterilizer Co.*, 126 F.3d 494, 503 n.5 (3d Cir. 1997).

recipient of the benefits is judicially estopped from contending that he is a "qualified individual with a disability" under the ADA.

In the middle of the continuum are cases that give no judicial estoppel effect to the mere fact that an ADA plaintiff has applied for disability benefits or received them, but that do give judicial estoppel effect to particular assertions made in the course of obtaining disability benefits and inconsistent with an ADA claim to be a "qualified individual with a disability." Exemplary of this approach is *Talavera v. School Board of Palm Beach County*, 129 F.3d 1214, 1220 (11th Cir. 1997), which reasoned that the mere application for or receipt of benefits was not "inherently inconsistent" with "qualified" status under the ADA, but that an ADA plaintiff should be judicially estopped "from denying the truth of any statements made" in the course of applying for disability benefits.

This middle-of-the-spectrum approach of *Talavera* and similar cases is highly fact-dependent; its outcome turns on the specifics of the statements, evidence, and arguments raised by the claimant in his quest for disability benefits, and the case-by-case determination of whether those statements are consistent with claims made under the ADA. *See* 129 F.3d at 1220 ("Whether in any particular situation there will be an inconsistency between applying for [social security disability] benefits and bringing an ADA claim will depend upon the facts of the case, including the specific representations made in the application for disability benefits and the nature and extent of the medical evidence in the record").

Most of the ADA judicial estoppel cases decided by the courts of appeals utilize the middle-of-the-spectrum approach typified by *Talavera*, although the courts using that approach seem to vary in their willingness to perceive inconsistencies between statements made in the course of applying for disability benefits and later assertions of ADA "qualified" status. *See, e.g., Swanks v. Washington Metropolitan Area Transit Authority*, 116 F.3d 582, 587 (D.C. Cir. 1997) (mere receipt of disability benefits does not work a judicial estoppel, but a claimant could well be barred from claiming that he was an ADA "qualified individual with a disability" if he specifically declared in his benefits claim that he could not perform the essential functions of his job even with reasonable accommodation).

Indeed, there are remarkably apposite state and federal cases which appear to employ the *Talavera* approach, and which hold ADA plaintiffs judicially estopped from contending that they could perform the essential functions of their jobs with reasonable accommodation when they have made contrary assertions in workers compensation proceedings. In *Jackson v. County of Los Angeles*, 60 Cal. App. 4th 171 (1997), *review denied*, 1998 Cal. Lexis 1541, for example, the plaintiff, a police officer who injured his back, shoulder, and "psyche" when attempting to restrain a violent hospital patient, received nearly $50,000 in workers compensation benefits to settle his claim for "permanent disability," was eventually placed on an extended medical leave of absence from which he never returned, and sued his employer under the ADA for failing to accommodate his disabilities. 60 Cal. App. 4th at 174-78. He was held judicially estopped from

claiming that he could perform the essential functions of his job by virtue of stipulations he entered into during the workers compensation settlement proceedings. *Id.* at 189-91. Also particularly apposite is *Cheatwood v. Roanoke Industries*, 891 F. Supp. 1528, 1538 (N.D. Ala. 1995) (ADA plaintiff judicially estopped from claiming he could perform the essential functions of his former job, because he testified to the contrary in workers compensation hearing).

Finally, at the "no judicial estoppel" end of the continuum, there are the Tenth Circuit ADA judicial estoppel cases – this one and *Rascon* – which refuse to apply judicial estoppel even in the face of glaring inconsistencies between the assertions an employee makes to obtain disability benefits and those he makes in his ADA lawsuit. This extreme approach is apparently based on two justifications: first, the consistent and longstanding Tenth Circuit refusal to apply the doctrine of judicial estoppel in any case, *see* 143 F.3d at 1332; App. 6, and second, the idea that questions of reasonable accommodation are never relevant to an award of disability benefits, 143 F.3d at 1330-31; App. 5 to App. 6, and that statements about reasonable accommodation are therefore meaningless non sequiturs when uttered in the context of disability benefits, rather than in the context of an ADA claim.

Of course, Boeing's judicial estoppel claims should carry the day under *any* of the four approaches *except* the Tenth Circuit's blanket rejection of judicial estoppel in all cases. Boeing's suggestion that respondent is judicially estopped from claiming himself "qualified" under the ADA by virtue of his application for and receipt of workers compensation and Boeing disability benefits for

"total" disability would prevail under the *McNemar* and *Cleveland* approaches, and Boeing's additional suggestion that respondent is judicially estopped from claiming himself "qualified" by virtue of his sworn testimony that he could not perform his job's essential functions with or without accommodation should prevail under those approaches and under the *Talavera* "specific statement" approach as well.

Finally, it is worth noting that, whatever one thinks of the Tenth Circuit's tradition of rejecting judicial estoppel in all cases, the other rationale the court of appeals gave for rejecting the application of judicial estoppel in this case – the belief that Kansas workers' compensation benefits are "awarded without regard to reasonable accommodation," App. 6 – is simply wrong, as the court of appeals would have discovered had it consulted the relevant Kansas case law instead of blindly assuming that Kansas workers compensation benefits are awarded on the same basis as social security benefits, *see* App. 6. *Griffin v. Dodge City Co-operative Exchange*, 23 Kan. App. 2d 139 (1996), for example, repeatedly specifies that one of the purposes of the Kansas Workers Compensation Act is to encourage employers to make the reasonable accommodations mandated by the ADA and by parallel provisions of the Kansas statutes. *See id.* at 140, Syl. ¶¶ 1, 2. One way the statute furthers that purpose is by minimizing the workers compensation liability of the employer who accommodates a worker. *See id.* at 147. Thus, for example, if an employee engages in *or is capable of engaging in* post-injury work, whether by accommodation in his pre-injury job or by transfer to an alternative job paying comparable wages, Kansas law imposes a

presumption of no work disability, thereby reducing the benefits due; by the same token, a finding that the employee cannot perform prior or substitute work (in other words, that he cannot be reasonably accommodated) is necessary to support a substantial work disability award. *See id.* at 151 (emphasis added).

Hence by swearing under oath in his workers' compensation case that he could not perform the essential functions of his sheet metal job, even with accommodation, respondent increased the potential value of his work disability claim, and thereby enhanced the amount that Boeing was willing to pay to settle his remaining future claim for permanent partial disability – the claim Boeing settled for $30,000. Had respondent asserted in his workers' compensation case, as he now asserts in this ADA lawsuit, that he was capable of returning to his old job (or an alternative job), his work disability claim would have been worth less, and Boeing's settlement offer correspondingly smaller. The court of appeals' idea that Kansas worker's compensation law does not take reasonable accommodation into account in its awards is erroneous as a matter of Kansas law.

This Case Presents an Important Judicial Estoppel Question Closely Similar to the Questions Presented in *Cleveland v. Policy Management Systems Corporation*, a Pending Case in which this Court has Granted Certiorari

The four "different" approaches to ADA judicial estoppel shown in the decisions of the courts of appeals reflect disagreements among the courts of appeals as to the judicial estoppel effect, if any, that should be given to

the "mere" application for, or receipt of, disability benefits by an ADA plaintiff who asserts that he is a "qualified individual with a disability." As we have seen, the *McNemar, Cleveland,* and *Talavera* approaches all permit judicial estoppel based on specific assertions made in pursuit of disability benefits, and would all impose judicial estoppel based on respondent's sworn testimony in his workers compensation hearing; they differ primarily in the effect they give the "mere" application for, or receipt of, such benefits. Which of the three approaches should be applied in a "mere application or receipt" case, where the choice among approaches makes a difference, presents an important question, as demonstrated by this Court's decision to review closely similar questions presented by *Cleveland v. Policy Management Systems Corp.*, 120 F.3d 513 (5th Cir. 1997), *cert. granted*, 119 S.Ct. 39 (1998).

If the *only* important question presented in the present case were the "mere application or receipt" question closely similar to those presented in *Cleveland, see* 119 S.Ct. 39 (1998) (order granting certiorari limited to two specified questions), then it would probably be appropriate for this Court to defer consideration of the petition for certiorari in this case until after it has decided *Cleveland,* because this Court's forthcoming *Cleveland* decision could well control this case, and justify summary disposal. Should this Court's *Cleveland* decision suggest, for example, that the court of appeals erred in the present case – as would happen if the Court either affirmed *Cleveland* or endorsed *McNemar* or *Talavera* – this Court would likely grant the petition, vacate the judgment of the court of

appeals, and remand for further consideration in light of *Cleveland*.

This case presents an important judicial estoppel question of its own, however, independent of the "mere application or receipt" questions this Court will consider in *Cleveland*. That independent question involves the judicial estoppel effect of respondent's *sworn testimony* during his Kansas workers compensation case against Boeing. That important, independent question merits attention in its own right, and is not contingent on the outcome of *Cleveland*.

CONCLUSION

This case presents important, recurrent questions of judicial estoppel as to which there are clear conflicts of authority, and which are closely related to the questions this Court will address in *Cleveland v. Policy Management Systems Corp.*, another ADA judicial estoppel case in which this Court has granted certiorari. Either the petition for certiorari should be granted now, or consideration of the petition should be deferred pending this court's decision in *Cleveland*.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

KENNETH W. ALDRICH, Plaintiff-Appellant,	)	
v.	)	No. 96-3413
THE BOEING COMPANY, a Delaware Corporation,	)	(Filed Jul. 1, 1998)
Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 95-CV-1083)

Albert F. Kuhl, Law Offices of Albert F. Kuhl, Lenexa, Kansas, for the Plaintiff-Appellee.

Mary K. Babcock (Trisha A. Thelen with her on the brief) Foulston & Siefkin, Wichita, Kansas, for the Defendant-Appellee.

Before **PORFILIO, MCKAY** and **LUCERO**, Circuit Judges.

LUCERO, Circuit Judge.

This case presents a novel question: May an impairment be substantially limiting for the purposes of the

Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, before the date a permanent disability rating has been issued by the treating physician? Answering this question in the affirmative, we reverse the judgment of the district court and remand for further proceedings.

I

Kenneth Aldrich, a former employee of The Boeing Company, appeals the district court's order granting summary judgment in favor of Boeing. The district court held that Aldrich was judicially estopped from pursuing a claim under the ADA and, alternatively, that he had failed to establish that he was a qualified individual with a disability.[1]

Aldrich was an assembly worker at Boeing's facility in Wichita, Kansas, from September 29, 1988, until he was laid off on June 8, 1993. Ten months prior to being laid off, Aldrich informed Boeing's Central Medical Department that he was experiencing pain in his right hand and was having difficulty using hand tools. He was referred to Dr. Harry Morris, an orthopaedic surgeon, for evaluation.

Dr. Morris examined Aldrich in August 1992 and made a preliminary diagnosis of "[c]umulative trauma syndrome manifesting as flexor tendon tenosynovitis."

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[1] Plaintiff also brought a retaliatory discharge claim pursuant to both the ADA and Kansas state law. He does not, however, appeal the district court's grant of summary judgment as to that claim.

Appellee's Supp. App. at 249. Dr. Morris determined Aldrich was unable to return to work and signed a medical leave of absence form, scheduling him for reevaluation in four weeks. At two subsequent evaluations in September and October, Dr. Morris noted that Aldrich's condition had improved; nevertheless, he extended Aldrich's medical leave of absence.

On November 17, Dr. Morris released Aldrich to return to work, limiting his use of power tools to four hours a day for the first week, but providing for a gradual increase in usage over the course of the following two weeks. Upon returning to work, however, Aldrich was informed by his supervisor that there was no work he could do with those medical restrictions, and was referred to the Personnel Department, where he was immediately placed on medical leave. For a brief period in early December, he was given a work assignment at Boeing's Facilities Department as a member of the "Warn Pool." According to Boeing, the Warn Pool was created to hold employees during the federally mandated sixty-day notice period prior to an anticipated layoff. Boeing removed Aldrich from this position when it discovered that he was not subject to layoff and placed him back on medical leave of absence.

Dr. Morris continued to treat Aldrich and evaluate him on a monthly basis. On April 7, 1993, Dr. Morris rated Aldrich as 15% permanently partially impaired. He wrote: "It is my impression that the patient can return to work but he must be in a job position where he has no rivetting [sic], bucking or power equipment use. There should be no repetitive grasping, gripping, pushing or

pulling as well." Appellee's Supp. App. at 256. Aldrich provided Boeing with Dr. Morris's report on April 19.

Approximately one week before he provided this permanent disability rating to his employer, Aldrich was informed that Boeing had declared a surplus in his job code and that he would be laid off on June 8, 1993. Three weeks prior to plaintiff's scheduled termination, Boeing's Accommodation Review Board met to determine whether Aldrich's permanent restrictions could be accommodated by the company. The Board determined that the limitations Dr. Morris had imposed on Aldrich prevented him from doing his current job, with or without accommodation, and that no other positions were available at that time. The Board thus decided that Aldrich would remain on medical leave of absence until he was terminated on June 8.

During the course of these events, Aldrich applied for disability benefits from several sources. On October 17, 1992, he filed a workers' compensation claim under Kansas law which was eventually settled in 1995 for $30,000. Four months later, Aldrich applied for permanent and total disability benefits under a private disability plan offered by Boeing. His application for benefits was approved in March 1994.

II

Noting that Aldrich filed for and received permanent and total disability benefits under Boeing's private disability plan, the district court held that his ADA claim was barred by the doctrine of judicial estoppel. Boeing

insists that Aldrich's lawsuit is also barred by this doctrine because of his claim for permanent and total disability benefits under Kansas workers' compensation law and because of plaintiff's testimony at a settlement hearing regarding this claim.[2] We reject both views.

In *Rascon v. U.S. West Communications*, No. 96-2194 1998 WL 223465 (10th Cir.1998), this circuit recently held that the application for, or receipt of, social security disability benefits does not estop a plaintiff from pursuing a claim under the ADA. *See id.* at *6. The logic behind eschewing judicial estoppel of an ADA claim even when the plaintiff has applied for or received disability benefits is that "the ADA takes into consideration whether an individual with a disability can work *given reasonable accommodation*. The Social Security Act, on the other hand, does not take into consideration whether an accommodation would render the individual able to perform a job." *Id.* at *7 (emphasis added) (citations omitted). Consequently, claims for social security benefits, because

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[2] Specifically, Boeing argues that Aldrich is estopped because he testified at the workers' compensation settlement hearing as follows:

> MR. BYERS [Attorney for Boeing]: Finally, I just wanted to make sure you understand and you agree that the settlement today for $30,000.00 to be paid in a lump sum is based on the fact and the understanding that your work restrictions are permanent, meaning that they won't be changed or lifted, and that these restrictions prevent you from performing the essential functions of the job as a sheet metal mechanic with or without accommodation?
>
> [Kenneth Aldrich]: Yes.

Appellee's Supp. App. at 228.

granted without regard to reasonable accommodation, are not necessarily inconsistent with a discrimination claim pursuant to the ADA. *See id.* It follows that, Aldrich is not estopped from pursuing his ADA claim merely because he applied for and received benefits under Boeing's private disability plan and the Kansas workers' compensation statute – those benefits are also awarded without regard to reasonable accommodation. *Compare* Boeing, *Disability and Life Insurance Plans* 8 (1990) (defining permanent and total disability for purposes of Boeing's private disability plan), *in* Appellee's Supp. App. at 186, and Kan. Stat. Ann. § 44-510c(a)(2) (1993) (defining "permanent total disability" under workers' compensation statute), *with* 42 U.S.C. § 423(d)(2)(A) (defining "disability" for purposes of social security disability benefits).

Boeing argues that plaintiff should nonetheless be estopped from pursuing his ADA claim because he testified at his workers' compensation settlement hearing that he could not perform his job with or without reasonable accommodation. Were we to adopt Boeing's approach, however, we would "discourage the determination of cases on the basis of the true facts as they might be established ultimately." *United States v. 49.01 Acres of Land*, 802 F.2d 387, 390 (10th Cir.1986) (quoting *Parkinson v. California Co.*, 233 F.2d 432, 438 (10th Cir.1956)). The Federal Rules of Evidence well provide the means with which to confront plaintiff with such inconsistency. *See* Fed. R. Evid. 801(d)(2) (permitting introduction in evidence of prior admission by party-opponent). Thus Aldrich's testimony "may constitute evidence relevant to a determination of whether the plaintiff is a 'qualified

individual with a disability,' " *Rascon*, 1998 WL 223465 at *9, but it is not dispositive.

Benefit determinations under the Kansas workers' compensation statute are made without regard to reasonable accommodation. Thus, Aldrich's admission at the settlement hearing was not relevant to the outcome of the proceedings. We see no reason to deviate from *Rascon*'s logic that "statements made in connection with an application for . . . disability benefits cannot be an automatic bar to a disability claim under the ADA" when such benefits are granted without regard to reasonable accommodation. *Id.*

III

The ADA provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). To establish a prima facie case under the Act, plaintiff must therefore demonstrate "(1) that he is 'disabled' within the meaning of the ADA; (2) that he is qualified – with or without reasonable accommodation; and (3) that he was discriminated against because of his disability." *Siemon v. AT&T Corp.*, 117 F.3d 1173, 1175

(10th Cir.1997) (citing *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir.1995)).

A

The ADA defines the term "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Plaintiff contends that he qualified as disabled under the first part of this definition on November 17, 1992 – the date Dr. Morris released him to work with restrictions following the initial diagnosis of flexor tenosynovitis.[3] The district court rejected that contention, finding instead that he was suffering from a "transient nonpermanent condition" and, accordingly, that his impairment was not substantially limiting. Appellant's App. at 875 (citing 29 C.F.R. § 1630.2(j)).[4]

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[3] Plaintiff proffers an alternative argument, asserting that Boeing knew he was disabled or regarded him as having a disability as of January 20, 1993, the date he was first assessed by the Accommodation Review Board. This claim is wholly without merit. Boeing presented uncontroverted documentation establishing that the January 20 review was scheduled for the purpose of accommodating permanent limitations unrelated to the diagnosis of flexor tenosynovitis. *See* Appellee's Supp. App. at 468, 532-33.

[4] The district court's analysis was limited to whether the original expected duration of plaintiff's impairment precluded it from being "substantially limiting" as required under the definition of disability at issue in this case. *See* 42 U.S.C. § 12102(2)(A). Because Boeing does not challenge that flexor tenosynovitis is an impairment or that a major life activity was

While not defined by statute, the regulations implementing the ADA define the term "substantially limits" as:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1). Several factors are relevant to the determination of whether an impairment is substantially limiting, including: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." 29 C.F.R. § 1630.2(j)(2). Although "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities," 29 C.F.R. pt. 1630 app., § 1630.2(j) (emphasis added), "an impairment does not necessarily have to be permanent to rise to the level of a disability. Some conditions may be long-term, or potentially long-term, in that their duration is indefinite and unknowable or is expected to be at least several months.

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affected, we do not address those elements of the definition for the purposes of this summary judgment appeal, and therefore limit our analysis to whether a temporary impairment can be substantially limiting.

Such conditions, if severe, may constitute disabilities," EEOC, *Interpretive Manual* (1995), *reprinted in* 2 *EEOC Compliance Manual* § 902.4(d), at 902-30 (BNA 1997) (*"EEOC Compliance Manual"*).

Boeing's insistence that it had no duty to accommodate plaintiff under the ADA until plaintiff's doctor issued a permanent disability rating and restrictions in April 1993 is incorrect. To the extent that Boeing argues that we should adopt a per se rule that an impairment may not be regarded as a disability until it is rendered "permanent" by either a doctor's rating or permanent restrictions, it misconstrues the law. Whether an impairment "substantially limits" a major life activity depends on the individual and the impairment. Such determinations are not susceptible to per se rules; they must be made on a case-by-case basis. *See* 29 C.F.R. pt. 1630 app., § 1630.2(j) ("The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual."). The regulations and the EEOC's interpretive guidelines clearly state that an impairment need not be permanent in order to rise to the level of a disability. *See* 29 C.F.R. § 1630.2(j)(2)(iii); *EEOC Compliance Manual* § 902.4(d), at 902-30. Thus, the issuance of a permanent disability rating in April 1993 does not necessarily answer the question of whether plaintiff's impairment previously qualified as a "disability."

Plaintiff argues that Boeing had an ADA duty of accommodation on November 17, 1992, "when he was released to work by Dr. Morris with restrictions." Appellant's Br. at 23-24. We disagree. Dr. Morris's evaluation on

that date anticipated that, by applying a progressive work schedule, plaintiff would return to full working capacity within three weeks. Because Aldrich's impairment was then characterized by his own doctor as being of short duration and negligible long-term impact, we reject Aldrich's argument that his impairment was substantially limiting as of November 17, 1992.

From December 9, 1992, however, Aldrich's medical evaluations become considerably less optimistic. On that date, Dr. Morris wrote: "I think at this point with this individual we're going to find he is just not going to be able to do repetitive type activities." Appellee's Supp. App. at 253. Two months later, Dr. Morris referred Aldrich to a Dr. Gluck for a second opinion. Dr. Gluck wrote: "I think that he has undergone [an] appropriate amount of conservative treatment with continuing significant symptoms. I think therefore he would be a good candidate for forearm fasciotomy." *Id.* at 254. One month later, Dr. Morris again evaluated Aldrich, stating:

> As long as he watches what he does and utilizes some work modification and minimal intensive activity he does fairly well. As soon as he goes over that line he begins to have problems. . . . As far as work is concerned he is certainly going to have difficulty going back to what he previously did. I think that at this point, then, we will state he has reached his maximum medical benefit and we will go ahead and rate him.

Id. at 255. Boeing Central Medical received copies of each of these evaluations.

Although none of these medical evaluations explicitly labels Aldrich's condition as "permanent," each constitutes evidence sufficient to find that plaintiff's impairment had become substantially limiting. Based on the Morris and Gluck statements, a reasonable jury could conclude that, at some point on or after December 9, 1992, Aldrich's flexor tenosynovitis was a severe condition that was permanent or was expected to persist on a long-term basis because its anticipated duration was indefinite, unknowable, or was expected to be at least several months. *See EEOC Compliance Manual* § 902.4(d), at 902-30; *cf. Katz v. City Metal Co.*, 87 F.3d 26, 32 (1st Cir.1996) (discussing plaintiff's ability to show disability in light of EEOC interpretive guidelines). The district court thus erred in concluding as a matter of law that plaintiff could not have been disabled under the ADA until his permanent disability rating was issued in April 1993.

B

In order to defeat summary judgment, Aldrich must show not only that he is disabled, but also that he is a "qualified individual." To determine whether an individual is qualified under the ADA:

> First, we must determine whether the individual could perform the essential functions of the job . . . . Second, if (but only if) we conclude that the individual is not able to perform the essential functions of the job, we must determine whether any reasonable accommodation by the employer would enable him to perform those functions.

White, 45 F.3d at 361-62 (quoting *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir.1993)).

Although Aldrich concedes that he was unable to perform the essential functions of his job, he insists he would have been able to do so with reasonable accommodation. Aldrich brings in support a report prepared by a certified professional ergonomist which concludes that modifications to his work environment and/or ergonomic training would have allowed him to perform the essential functions of his original job. The report also states that Boeing could have accommodated Aldrich by transferring him to one of several positions within his skill and grade level.

Viewing the factual record in the light most favorable to the plaintiff, we see a genuine issue of material fact concerning whether work modifications and/or ergonomic training were reasonable accommodations that would have permitted plaintiff to return to his original job as an assembly worker. We also find evidentiary support for plaintiff's argument that there existed two other positions to which he could have been reassigned as a reasonable accommodation.[5] We consider Boeing's

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[5] The remaining twenty-three jobs Aldrich proffers would not be *reasonable* accommodations for different reasons. Boeing presented unrebutted affidavits and supporting documentation indicating that no open requisitions existed from November 17, 1992, to June 8, 1993, for sixteen of the jobs. *See* Appellee's Supp. App. at 144-45, 150-57, 162-63. Boeing is not required to create positions merely to accommodate Aldrich. *See White*, 45 F.3d at 362 (citing 29 C.F.R. pt. 1630 app., § 1630.2(o)). Neither was Boeing obligated to transfer plaintiff to four of the other remaining positions – Plumber Maintenance B, A, and Special,

statements that employees with permanent medical restrictions were eligible to be assigned to Factory Service

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and Millwright B – because transfer to any of those positions would have constituted a promotion. *See* 29 C.F.R. pt. 1630 app., § 1630.2(o) ("[A]n employer is not required to promote an individual with a disability as an accommodation."). Finally, had Boeing transferred Aldrich to any of the last three disputed jobs – Maintenance Oiler, Assembler Sub-Assembly B, and Assembler Installer General B – it would have violated the seniority provisions of the collective bargaining agreement. This is not required by the ADA. *See Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1125 (10th Cir.1995) (holding transfer to another job that would violate seniority rights under collective bargaining agreement unreasonable); *see also Kralik v. Durbin*, 130 F.3d 76, 83 (3d Cir.1997) ("[A]n accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable."); *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir.1997) ("Following the other circuits which have considered this issue, we hold that the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1051 (7th Cir.1996) ("[T]he ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees."); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir.1995) ("The ADA does not require that [the employer] take action inconsistent with the contractual rights of other workers under a collective bargaining agreement."); *cf. Shea v. Tisch*, 870 F.2d 786, 790 (1st Cir.1989) (employer "not required [under Rehabilitation Act] to accommodate plaintiff further by placing him in a different position since to do so would violate the rights of other employees under the collective bargaining agreement"); *Carter v. Tisch*, 822 F.2d 465, 469 (4th Cir.1987) (duty to reassign under Rehabilitation Act "would not defeat the provisions of a collective bargaining agreement unless it could be shown that the agreement had the effect or the intent of discrimination").

Attendant A positions and several were placed in those positions in December 1992 and January 1993. *See* Appellee's Supp. App. at 169-170. Additionally, according to Boeing records, a requisition for a Factory Clerk C position was initiated on November 18, 1992 and filled on February 1, 1993. *Id.* at 151, 159.[6] Although the records indicate that this position may have been filled by an employee with Category A rights, they are inconclusive on this point because the individual who filled this position is unnamed. *See id.* Even if the position was filled by someone with Category A rights in February, that does not defeat plaintiff's claim that the Factory Clerk C position was available as an accommodation prior to February. Because Category A rights do not allow one employee to bump another, it is of no consequence that someone with such rights ultimately filled the position. Plaintiff may prevail so long as he was "disabled" prior to February 1 and he is able to show that transfer to the Factory Clerk C position was a reasonable accommodation.

Because we conclude that a reasonable jury could determine that plaintiff's impairment was substantially limiting for purposes of the ADA, we must also conclude

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But *see Aka v. Washington Hosp. Ctr.*, 116 F.3d 876, 894-897 (D.C.Cir.) (holding terms of collective bargaining agreement only a factor in weighing reasonableness of accommodation), *reh'g en banc granted and judgment vacated*, 124 F.3d 1302 (D.C.Cir.1997).

[6] Despite Boeing's general contention that these records are inaccurate in places, *see* Appellant's Supp. App. at 144, 455, 461, it failed to submit any evidence that *this particular entry* was incorrect.

that plaintiff may have been eligible for a Factory Service Attendant A or a Factory Clerk C position as early as December 1992. A genuine issue of material fact remains as to whether reasonable accommodation was feasible, either in the form of job modifications or transfer to a vacant position for which appellant was qualified.[7]

C

With respect to the final element of the prima facie case – whether plaintiff was discriminated against on account of his disability – the record contains ample

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[7] In *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167, 1169 (10th Cir.1996), this court held that "a reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation." Boeing's decision to place Aldrich on medical leave of absence may have been such an accommodation. *See id.* at 1168-69; *see also Burch v. Coca-Cola Co.*, 119 F.3d 305, 318 n. 11 (5th Cir.1997) (employer's decision to retain employee on suspension with full pay may have been a reasonable accommodation) (citing *Hudson*, 87 F.3d at 1169); *Hankins v. The Gap, Inc.*, 84 F.3d 797, 801 (6th Cir.1996) ("paid sick leave, paid personal days, a voluntary time off program, and ample and flexible vacation time" constitute reasonable accommodation); 29 C.F.R. pt. 1630 app., § 1630.2(o) (reasonable accommodations "could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment"); 29 C.F.R. pt. 1630 app., § 1630.15(b) & (c) ("[A]n employer . . . may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship."). Because Boeing does not contend, however, that it reasonably accommodated Aldrich by providing him with leave time, we decline to answer that question on appeal.

evidence that Boeing placed plaintiff on involuntary medical leave because of his flexor tenosynovitis. The prima facie case requires nothing more. *See White*, 45 F.3d at 361 n. 6 (noting that third element of prima facie case is satisfied when employer admits disability played a role in the disputed decision). Thus, to the extent plaintiff's claim is premised on Boeing's failure to reinstate him prior to his scheduled termination, the record is replete with evidence that such failure was a direct result of his alleged disability.

Plaintiff's claim, however, is slightly more complex than a mere allegation of failure to reinstate. Plaintiff consistently argued below, as he does here, had Boeing offered him an accommodation, he would have survived the reduction-in-force that resulted in his termination on June 8, 1993. Although Aldrich concedes that the reduction-in-force was validly implemented, he notes that he would not necessarily have been dismissed had Boeing transferred him to a vacant position because that position might not have been subject to the reduction-in-force. To the extent plaintiff's claim is premised on the argument that workplace modifications or ergonomic training would permit him to perform his original job, his own concession that the reduction-in-force was based solely on seniority limits his claim to one for backpay through June 8, 1993, because he cannot show discrimination caused the termination – he can only show that discrimination was the basis for being placed on involuntary medical leave.

If, however, plaintiff prevails on a theory that transfer to a Factory Service Attendant A position would have been a reasonable accommodation, there is evidence

before us that supports Aldrich's claim that he may have remained in that position through early July. *See* Appellant's App. at 639, 649-50 (listing start dates and termination dates of employees in Factory Assistant A positions). There is no evidence in the record that the employee placed in the Factory Clerk C position on February 1, 1993, was ever terminated. Thus, there remains a further issue of material fact as to whether plaintiff's employment would have continued past June 8, 1993, and, if so, for how long. We, of course, do not resolve this issue on appeal and note only that plaintiff may be able to establish that his tenure at Boeing would have been of longer duration depending on the nature of the accommodation.

We **REVERSE** the judgment of the district court and **REMAND** for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KENNETH W. ALDRICH, Plaintiff - Appellant, v. THE BOEING COMPANY, a Delaware Corporation, Defendant - Appellee.	)	No. 96-3413

ORDER

Filed July 28, 1998

Before **PORFILIO, McKAY** and **LUCERO**, Circuit Judges.

Appellee's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court

PATRICK FISHER,
Clerk of Court

by:/s/ Kevin Schwalbe
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

KENNETH W. ALDRICH, Plaintiff,	)	
v.	)	Case No. 95-1083-KMH
THE BOEING COMPANY, Defendant.	)	

MEMORANDUM AND ORDER

(Filed Nov. 21, 1996)

This matter is before the court on defendant's motion for summary judgment (Doc. #113). The underlying action arises from plaintiff's claim that the defendant violated the Americans With Disabilities Act (ADA), 42 U.S.C. § 12101 *et seq.*, by refusing to reasonably accommodate plaintiff's disability and by terminating his employment. Plaintiff also claims that Boeing retaliated against him for filing a worker's compensation claim. Having considered the arguments of the parties, the court enters the following ruling.

Factual Background

The following facts are uncontroverted or, where properly controverted, construed in the manner most favorable to the nonmoving party. However, the court has not addressed factual allegations submitted by the parties which are not material to this ruling nor has the court considered factual allegations which are not properly

supported by deposition testimony, exhibits and affidavits.

Plaintiff began working at Boeing on September 29, 1988 and was continuously employed until his layoff on June 8, 1993. Plaintiff held two separate sheet metal assembly jobs during his Boeing employment: Assembler Installer Structures B (305-04) and Assembler Sub-Assembly B (200-04).[1]

Between 1990 and 1994, Boeing conducted a massive reduction in force. The Wichita division reduced its work force from 22,593 employees in 1990 to 15,233 in 1994. Roughly one out of every three Boeing employees working in 1990 was laid off by 1994. The greatest numerical reduction at Wichita occurred from 1991 to 1993 when approximately 6,500 employees were laid off. Between November 17, 1992 and June 8, 1993, Boeing had a large surplus of workers and did not hire new workers.

On August 4, 1992, plaintiff reported to Boeing Central Medical complaining of pain in his right hand, numbness and a decreased grip when using small hand tools. Boeing referred plaintiff to Dr. Morris, a local orthopaedic surgeon, for evaluation.

Dr. Morris examined plaintiff on August 26, 1992. Plaintiff told Dr. Morris that he was a sheet metal

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[1] At the time of his injury, plaintiff's 305-04 job involved the installation of aluminum door frames. The job required plaintiff to read instructions, position parts, drill holes, install rivets, deburr the assembly and finally, move the completed assembly to a holding area. A 305-04 category job required frequent use of hand power tools for drilling and riveting sheet metal.

mechanic at Boeing and did a significant amount of drilling, riveting and bucking. Dr. Morris' diagnosis was cumulative trauma syndrome manifesting as flexor tenosynovitis.[2] Dr. Morris advised plaintiff to avoid using vibrating hand-operated equipment for thirty days and to avoid any repetitive hand activity at work or at home. Dr. Morris signed a medical leave of absence for plaintiff, stating plaintiff was medically unable to return to work and would be reexamined in four to six weeks. Dr. Morris also stated that the date for return to work was "unknown at this time."

On September 23, 1992, Dr. Morris re-examined plaintiff. He noted improvement, but determined that plaintiff would benefit from avoiding the use of power tools for another thirty days. Dr. Morris did not release plaintiff to return to work.

Plaintiff filed a worker's compensation claim with Boeing on October 17, 1992.

Dr. Morris examined plaintiff again on October 21, 1992. He noted that plaintiff's original symptoms had returned. The reoccurrence of the original symptoms was attributed to plaintiff's work with his livestock at home. Dr. Morris placed plaintiff on Indocin, an anti-inflammatory drug with analgesic properties.

On November 17, 1992, Dr. Morris examined plaintiff and noted an improvement in plaintiff's symptoms which he attributed to the Indocin and plaintiff's time off from work. Dr. Morris released plaintiff to return to work,

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[2] Tenosynovitis is an inflammation of a tendon and its enveloping sheath. Steadman's Medical Dictionary (1995)

provided that, during the first week, use of power tools was limited to four hours a day; during the second week, use of power tools was limited to six hours a day and by the third week, plaintiff could work with power tools for eight hours. Dr. Morris' notes indicate that he would re-evaluate plaintiff at the end of the third week to see if plaintiff was having any difficulty with that program.

Plaintiff returned to Boeing and provided Dr. Morris' restrictions to his immediate supervisor, Telford Snyder. Snyder reviewed the restrictions and advised plaintiff that he could not use him in a 305-04 job with these restrictions and directed him to the personnel department. The personnel department placed plaintiff back on a medical leave of absence.

In late November 1992, the personnel department contacted plaintiff at home and directed him to report to the facilities department on December 2, 1992. Plaintiff reported to the facilities department as directed and was assigned to help a millwright.

On December 3, 1992, plaintiff was examined by Dr. Morris. Dr. Morris revised plaintiff's restrictions to no riveting/bucking and no repetitive grasping/gripping in excess of sixty per hour. Dr. Morris included a note that plaintiff's present job in facilities appeared to satisfy these restrictions, but scheduled plaintiff for additional testing.

Due to the large number of layoffs and federal laws requiring that workers be given sixty days notice of a possible layoff, Boeing created a Warn Pool to hold employees during the sixty day time period. Boeing

placed these employees into the facilities department to perform "created work."

Boeing assigned plaintiff to the Warn Pool from December 2, 1992 to December 9, 1992. Boeing then discovered that plaintiff was not subject to a layoff within sixty days and had been incorrectly placed in the Warn Pool. Plaintiff was removed from the Warn Pool and placed back on a medical leave of absence.

Dr. Morris reexamined plaintiff on December 9, 1992 and expressed the opinion that plaintiff was probably not going to be able to do repetitive type activities. Dr. Morris understood that plaintiff was laid off from his job and that plaintiff would have time off to see whether his symptoms "calmed down."

Dr. Morris re-examined plaintiff on December 22, 1992 and noted that plaintiff's difficulties and symptoms continued. Dr. Morris decided plaintiff should have a six-week trial of "minimal or no activity with his hands and wrists in order to calm his forearms down." Dr. Morris opined that if plaintiff's condition improved at the end of the six-week period a progressive strengthening program would be initiated. Dr. Morris also noted that if plaintiff's problems continued surgery might be necessary.

Boeing implemented a formal process for reviewing employee accommodation requests during the summer of 1992. The Accommodation Review Board was comprised of representatives from personnel, manufacturing, labor relations, work force, medical, employment, equal employment opportunity, human resources, legal and insurance.

On January 20, 1993, the Board met to discuss accommodations for plaintiff. The Board interpreted Dr. Morris' entry of December 22, 1992 as taking plaintiff "off work" and, therefore, did not consider plaintiff for an accommodation.

On February 2, 1993, Dr. Morris re-examined plaintiff and recorded his comments that symptoms of tightness, pressure and pain in his forearms returned whenever he did any activity utilizing his hands. Dr. Morris referred plaintiff to Dr. Gluck for a second opinion. Dr. Morris reviewed Dr. Gluck's opinion and noted that, as far as work is concerned, "he is certainly going to have difficulty going back to what he previously did."

On April 7, 1993, Dr. Morris provided plaintiff with a disability rating. He indicated that the patient could return to work, but must be in a job where he has no riveting, bucking or power equipment use. Further, there should be no repetitive grasping, gripping, pushing or pulling. Dr. Morris noted that the symptoms were caused by the repetitive nature of the activities, rather than the weight or volume of lifting. He found plaintiff had a permanent, partial impairment equal to fifteen (15) percent.

On April 8, 1993, plaintiff received a Warn Notice stating that there was a surplus declared in his job code 305-04 and the estimated day of layoff was June 8, 1993. On April 19, 1993, plaintiff returned to Boeing and provided Boeing with a letter from Dr. Morris stating the permanent partial impairment rating and the work limitations reflected in Dr. Morris' office notes of April 7, 1993.

On April 22, 1993, Boeing evaluated plaintiff's 305-04 job to determine whether or not Dr. Morris' permanent restrictions could be accommodated. Boeing determined that bucking and riveting were essential functions of the job and that Boeing could not accommodate the limitations of "no repetitive grab-grasp, push-pull, bilateral upper extremities or no riveting, bucking or use of power tools bilaterally."

On May 19, 1993, the Accommodations Review Board met to consider a possible accommodation for plaintiff. The Board determined that plaintiff's permanent medical restrictions did not allow him to dō the 305-04 job, with or without accommodations, and that there were no other positions available to accommodate plaintiff. The Board determined that the plaintiff would remain on a medical leave of absence until his scheduled reduction in force layoff on June 8, 1993. Plaintiff was laid off from his 305-04 job on June 8, 1993, the same day on which 222 other workers with the 305-04 job code were also laid off.

The terms of plaintiff's employment at Boeing were governed by a collective bargaining agreement between the International Association of Machinist and Aerospace Workers, AFL-CIO and Boeing. Pursuant to the 1992 agreement, layoffs in a job category were determined by an employee's seniority date. The potential layoff of an employee was complicated by provisions allowing an employee to transfer to another job category if the employee had "Category A rights." An employee gained "Category A rights" to any job held for more than 30 days.

As Boeing began downsizing, employees exercised their Category A rights to transfer to job categories they hoped would provide greater longevity. Plaintiff exercised his Category A rights to transfer from a job coded 200-04 to a job in category 305-04 to avoid a layoff on July 14, 1992.

During 1992-1993, there were numerous employee transfers to balance workloads after layoffs and to allow workers to avoid layoffs by returning to a job in which they had Category A rights and sufficient seniority. In filling positions, Boeing always gave first consideration to employees who had Category A rights for that particular job.

The collective bargaining agreement between Boeing and the Union provided an insurance benefit for permanent and total disability. The plan provided in pertinent part:

> For the purposes of this Plan, you are permanently and totally disabled if at least one of the following applies to you:
>
> 1. Your disability has existed continuously for six months and will presumably prevent you from engaging in any employment for pay of profit for the rest of your life, including employment for which you may become fitted by education, training or experience.
>
> . . . .
>
> 3. You have lost the use of both hands or both feet or one hand and one foot.

If qualified under that definition, the plan provided for $20,000 in benefits paid in monthly installments of $325.

While plaintiff was on medical leave of absence, Boeing sent a letter advising him that he might be eligible to apply for disability benefits. Plaintiff filled out and signed an application for permanent and total disability benefits on February 2, 1993. The application itself did not define permanent and total disability, but the transmittal letter provided:

> If you feel that you meet the definition of Permanent and Total Disability, as explained in detail on page 8 of the Hourly Employee Benefits booklet, "Boeing Disability and Life Insurance Plans", you may apply at this time. Enclosed are the necessary forms.

On March 14, 1994, Aetna, the insurance carrier, notified plaintiff and Boeing that plaintiff's application for permanent and total disability had been approved and monthly benefits would be provided, effective July 1, 1993. An employee receiving total and permanent disability benefits is required to notify Aetna of any change in his or her ability to return to work. Plaintiff has provided no notice to Aetna that he is capable of "engaging in any employment for compensation or profit." Plaintiff continues to receive a monthly check from Aetna for permanent and total disability benefits.

On March 14, 1995, the plaintiff agreed to settle his worker's compensation claim. Boeing had paid $2,203.66 in medical expenses, $26,752.73 in temporary total disability compensation and $6,865.91 in vocational rehabilitation expenses. Plaintiff agreed to settle the remaining portion of his worker's compensation claim for an additional payment of $30,000. The settlement and

payment of $30,000 was based upon the plaintiff's representation that he was physically unable to perform the job of Assembler Installer Structures B (305-04). Plaintiff specifically acknowledged that the medical restrictions prevented him from performing the essential functions of the job with or without accommodations.

Summary Judgment Standard

The court shall render summary judgment upon a showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The rule provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The substantive law identifies which facts are material. *Id.* at 248. A dispute over a material fact is "genuine" when the evidence is such that a reasonable jury could find for the non-movant. *Id.* "Only disputes over facts that might properly affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

The movant bears the initial burden of showing the absence of a genuine issue of material fact. *Shapolia v. Los Alamos Nat'l. Lab*, 992 F.2d 1033, 1036 (10th Cir. 1993). This burden may be discharged by showing there is an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1985). Once

the movant makes a properly supported motion, the nonmovant must do more than merely show there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1985). The nonmovant must go beyond the pleadings and, by affidavits, depositions, answers to interrogatories, and admissions on file, designate specific facts showing there is a genuine issue for trial. *Celotex*, 477 U.S. at 324 (interpreting Fed. R. Civ. P. 56(e)). Rule 56 requires the court to enter summary judgment against a nonmovant who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Id.* at 322. Moreover, a complete failure of proof on an essential element of the nonmovant's case renders all other facts immaterial. *Id.* at 323.

A court must view the facts in the light most favorable to the nonmovant and allow the nonmovant the benefit of all reasonable inferences to be drawn from the evidence. *C.E.G. United States v. O'Block Oak*, 788 F.2d 1433, 1435 (10th Cir. 1986) . The court's function is not to weigh the evidence, but merely to determine whether there is sufficient evidence favoring the nonmovant for a finder of fact to return a verdict in that party's favor. *Anderson*, 477 U.S. at 249. Essentially, the court performs a threshold inquiry of determining whether a trial is necessary. *Id.* at 250.

Discussion

1. Disability

The ADA prohibits discrimination against persons with disabilities. It provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

To qualify for relief under the ADA, a plaintiff claiming wrongful termination must establish:

> (1) that he is a disabled person within the meaning of the ADA; (2) that he is qualified, that is, with or without reasonable accommodation (which he must describe), he is able to perform the essential functions of the job; and (3) that the employer terminated him because of his disability.

White v. York International Corp., 45 F.3d 357, 360-61 (10th Cir. 1995).

In moving for summary judgment, Boeing asserts that plaintiff's claim fails for lack of a genuine factual issue on the essential elements of plaintiff's claim. Specifically, Boeing argues that plaintiff has no evidence that his seniority-based layoff was linked to his disability. Further, Boeing argues that plaintiff's reasonable accommodation claim fails because Boeing did not have an obligation to accommodate and its failure to reassign plaintiff to a different job was not related to his impairment. Finally, Boeing argues that plaintiff is estopped from claiming reasonable accommodation based on his

application and receipt of permanent, total disability benefits.

With respect to the 305-04 job, Plaintiff is not "qualified" as defined by the ADA and his termination was based upon a reasonable and nondiscriminatory business practice. Medical records in this case confirm plaintiff could not perform the essential functions of the 305-04 job; any doubts have been resolved by plaintiff's testimony at his worker's compensation hearing where plaintiff testified that, with or without accommodation, he could not perform the 305-04 job duties. Additionally, plaintiff's termination on June 8, 1993 was not based upon discrimination. Plaintiff was laid off with 222 other 305-04 code employees on the basis of seniority.

Plaintiff does not dispute that his layoff from the 305-04 position in June 1993 was based upon a legitimate seniority ranking. Instead, he argues that Boeing discriminated against him earlier by failing to provide reasonable accommodation after Dr. Morris released him for work with restrictions on November 17, 1992. Plaintiff argues that Boeing should have accommodated his injury by transferring him to a job classification with lighter duties which, hypothetically, would have allowed him to avoid the June 1993 layoff of employees in the 305-04 job category.

The difficulty with plaintiff's theory is that it is predicated on hindsight concerning the nature and duration of plaintiff's injury.[3] The ADA does not apply to a transient,

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[3] Plaintiff's premise that discriminatory intent can be inferred from evidence that he would have survived a layoff if

nonpermanent condition. *McDonald v. Pennsylvania Dept. of Public Welfare*, 62 F.3d 92 (3d Cir. 1995). An employee's inability to work for one to two months is not permanent or for such an extended time as to be the type of disability contemplated by ADA. *Id.* EEOC regulations exclude temporary impairments from protection under the ADA. "Temporary, nonchronic impairments of short duration, with little or no term of permanent impact, are usually not disabilities. Such impairments may include, but are not limited to broken limbs, sprained joints, concussions, appendicitis, and influenza." 29 C.F.R. § 1630.2(j).

Here, Dr. Morris' initial notes of August 26 reflect a diagnosis of inflamed tendons and a treatment of rest for the afflicted forearms and hands. Thereafter, Dr. Morris regularly examined plaintiff at monthly intervals and by November 17 released him with a work program designed to return him to full working capacity after two weeks. When plaintiff presented his work restrictions to his supervisor on November 17, 1992, the limitations reflected only a temporary restriction on plaintiff's work activity. The medical records of November and December also only reflected an injury of a temporary nature. Boeing is not obligated under the ADA to consider or provide reasonable accommodations for a temporary impairment. To hold otherwise would require an

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he had been reassigned to another job category is also flawed. Boeing's downsizing involved the layoff of thousands of workers. Plaintiff's selection, after a major downsizing, of a job category where his seniority would hold merely substitutes the infallibility of hindsight for the misfortune of working in a job category which is overstaffed.

employer to unnecessarily expend resources in accommodating an impairment which is only temporary in nature.

Additionally, the court finds no genuine issue of material fact concerning Boeing's failure to reassign plaintiff to a different job between November 17, 1992 and June 8, 1993. Although plaintiff contends this lack of accommodation reflects discriminatory intent, the argument fails. Reassignment may be considered as a reasonable accommodation, but the ADA does not require promotion, reassignment to an occupied position, or creation of a new position as an accommodation for a disabled worker. *White v. York International Corporation,* 45 F.3d 357, 362 (10th Cir. 1995). Reassignment as an accommodation was extremely limited because Boeing was engaged in a major down-sizing and employees positioned themselves in jobs based upon Category A rights and seniority to avoid a layoff.[4] In and of itself, Boeing's practice of giving first consideration to employees with Category A rights does not violate of the ADA. The complexity of rules concerning job placement at Boeing is possibly rivaled by only the civil service system of rules and regulations. However, during a major downsizing, consistent application of otherwise neutral job placement rules eliminate claims of discrimination and arbitrary employment practices.

Boeing submitted an affidavit by its manager of staffing services to the effect that, pursuant to the terms of the

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[4] As noted, plaintiff exercised his own category A rights to transfer to the 305-04 job and avoided a layoff from a 200-04 position in 1992.

collective bargaining agreement and Boeing's recognized practice of giving priority to Category A rights, there were no vacant jobs available to accommodate plaintiff between November 19, 1992 and June 8, 1993. Defendant challenges Boeing's assertion, but after careful consideration and analysis, the court finds that plaintiff has not presented a genuine issue of material fact on this point.[5] Plaintiff fails to establish the availability of an alternative job for an accommodation.

Finally, as a matter of law, the plaintiff is not a "qualified individual with a disability" and is estopped from claiming otherwise. The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(a). The ADA was designed to afford relief

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[5] Plaintiff strenuously argues that placement in the facilities job on December 2 demonstrates that reasonable accommodations existed. However, plaintiff was only placed into the facilities position under the erroneous assumption that he would be laid off within sixty days. This position was only a "make work" holding pool for employees who were to be laidoff. Also, plaintiff has repeatedly referenced the union's interpretation of the collective bargaining agreement concerning the priority given Category A rights. The Union's position has been rejected three times in arbitration. Finally, plaintiff's reliance on the findings of the Office of Federal Contract Compliance Programs (OFCCP) is misplaced. OFCCP's investigation and findings focused on federal regulations imposing a duty of affirmative action under the Rehabilitation Act. Affirmative action is not a part of this ADA claim and the OFCCP findings lack relevance.

only to those individuals with disabilities who can perform the essential functions of the job they hold or seek. *Parker v. Metropolitan Life Insurance Co.*, 875 F. Supp. 1321, 1326 (W. Dist. Tenn. 1995). Plaintiff filed a claim for permanent and total disability benefits in an application filed February 2, 1992 and the claim was subsequently approved. Plaintiff cannot now claim that he was, at that time, capable of performing the essential functions of his job. *See, Garcia-Paz v. Swift Textiles, Inc.*, 873 F. Supp. 547, 555-56 (D. Kan. 1995); *Ricks v. Xerox Corp.*, 877 F. Supp. 1468, 1477 (D. Kan. 1995); *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471, 1484-85 (D. Kan. 1995); *Smith v. Midland Brake Co., Inc.*, 911 F. Supp. 1351, 1356-61 (D. Kan. 1995); *Lamury v. Boeing*, 1995 W.L. 643835 (D. Kan. 1995); *Cheatwood v. Roanoke Industries*, 981 F. Supp. 1528, 1538 (N.D. Ala. 1995); *McNemar v. The Disney Stores, Inc.*, 1995 W.L. 390051 (E.D. Pa. 1995); *Regal v. Kieser Foundation Health Plan of North Carolina*, 859 F. Supp. 963, 969-70 (E.D. N.C. 1994); *Kennedy v. Applause, Inc.*, 1994 W. L. 74765 (C. D. Cal. 1994); *Peoples v. City of Salina*, 1990 W.L. 47436 (D. Kan. 1990) (Rehabilitation Act) . As one court stated when faced with a comparable situation, "plaintiff in the case *sub judice* cannot speak out of both sides of [his] mouth with equal vigor and credibility before this court." *Regal*, 859 F. Supp. at 970. The plaintiff cannot simultaneously be unable to work and able to perform the duties of his position. *McNemar*, 1995 WL 399051 at *4. Having represented himself to be totally disabled in his application for permanent and temporary disability, there is no reasonable accommodation that Boeing could have made which would have enabled plaintiff to perform his job. *See, Kennedy*, 1994 W.L. 740765 at *6.

In seeking to avoid the consequences of his disability application, plaintiff argues that he was unaware of the legal ramifications of that application on his ADA case. The provisions defining permanent and total disability are contained in a benefit booklet mailed to plaintiff at his home during his employment and are also contained in the provisions of the Collective Bargaining Agreement. Plaintiff continues to receive monthly disability benefits but has never notified the insurance provider that he is capable of employment. Plaintiff's self-serving, conclusory statement that he did not understand the import of his application for permanent disability application is untenable. His actions and statements are wholly inconsistent with his claim that he is a "qualified" individual pursuant to the ADA.

2. Retaliation for Worker's Compensation Claim

Plaintiff's pendent claim that Boeing illegally retaliated against him because he filed a worker's compensation claim fails for lack of a causal connection to his termination. Plaintiff was terminated based upon his seniority in the 305-04 position.

As in the ADA claim, plaintiff alleges illegal retaliation in failing to accommodate him by assignment to another position. The court finds no causal link between the plaintiff's filing of his worker's compensation claim and his opportunity for other positions. Boeing undertook a major reduction in force and, in the few instances where positions were open, legitimate, established selection practices resulted in other employees being selected.

No legal basis has been established for the pendent retaliation claim.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment (Doc. #113) is hereby GRANTED.

DATED at Wichita, Kansas this 21 day of November, 1996.

/s/ Karen M. Humphreys
KAREN M. HUMPHREYS
UNITED STATES
MAGISTRATE JUDGE